

CRIMINAL APPEAL No.316 OF 1993

With

CRIMINAL APPEAL NO. 351 of 1993

Against the judgment of conviction and order of sentence dated 7th September, 1993 and 8th September, 1993 passed by Sri Kapileshwar Prasad, 10th Additional Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 79/66 of 1989.

1. LAL MUNI RAM
2. BIGU RAM
3. NUSAH RAM
4. BHOLA RAM
5. SIPAHI RAM
6. INAR RAM @ INDRA RAM

- APPELLANTS (Cr. Appl. No. 316/1993 SJ)
1. RAMASHRAY RAM APPELLANT (Cr. Appl. No. 351/1993 SJ)

VERSUS

STATE OF BIHARRESPONDENT

For the Appellants :- Mr. Kamal Nayan Choubey, Sr. Advocate
Mr. nagendra Dubey, Advocate
Mr. Sunil Kumar Singh, Advocate

For the State :- Mr. Ali Mozaffar, APP
Mr. Azeem, APP

For the Informant :- Mr. Kamlakant Pandey, Advocate

P R E S E N T

THE HON'BLE MR. JUSTICE SHYAM KISHORE SHARMA

S. K. Sharma, J.

Both the above noted appeals have arisen out of a common judgment by which the above named appellants have been convicted and sentenced vide judgment and order dated 7th September, 1993 and 8th September, 1993 respectively passed by the 10th Additional Sessions Judge, Rohtas at Sasaram in Sessions Trial No. 79/66 of 1989.

Appellants Lalmuni Ram, Bigu Ram, Nusha Ram, Bhola

Ram, Sipahi Ram and Indra Ram were convicted under sections 149/304 Part I of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for 10 years. The appellant Ramashray Ram was convicted under section 304 Part I of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for 10 years. Appellants Ramashray Ram, Bhola Ram and Indra Ram were also convicted under section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for 2 years. However, it is ordered that all the sentences will run concurrently.

The basis of the prosecution case is a fard beyan given by Ram Dhyan Paswan before the A.S.I. of Nokha Police Station on 14.7.1988 at 4.00 P.M. in which he stated that at 12.30 P.M. on 14.7.1988 the informant and his brother deceased Ram Dahin Paswan were proceeding for taking meal. While they were in front of the house of appellant Lalmuni Ram then his nephew met and informed that Ramashray Ram and Lalmuni Ram were cutting the Behaya plant from the land of the State of Bihar but the said land was filled up by them. The informant asked as to why they were cutting then they were called in the evening. The appellants Lalmuni Ram, Bigu Ram were carrying lathi, Nusah Ram were armed with Garansa and Bhola Ram, Ramashray Ram and Indra Ram were armed with country made gun. Sipahi Ram was carrying a lathi. All came from various directions and all of them encircled the informant and his brother. Ramashray Ram fired which caused injury to Ram Dahin Paswan on his abdomen who fell down. At that time

informant tried to save himself but as the accused persons were many in number, the informant was assaulted. Lalmuni Ram, Nusah Ram assaulted the informant by lathi and Garansa respectively which caused head injury to the informant. Hearing the sound of assault Dandan Paswan, Hira Lal Paswan, Ajay Kumar Paswan and Chhatu Paswan rushed there and the accused persons escaped. Informant's mother Anurajiya and aunt Phulbasiya, neighbour Bhanu Paswan, also rushed and witnessed the occurrence. Ram Dahin Paswan was taken to Nokha State Dispensary. Other injured persons were also taken for treatment. Ram Dahin Paswan was in bad state of health. So he could not make his statement. Information was given by the informant which led to registration of the case under sections 307, 147, 148, 149, 323, 324/34 of the Indian Penal Code and section 27 of the Arms Act. Injured Ram Dahin Paswan died in S.S.P.G. Hospital, Varanasi on 15.7.2008. So section 302 of the Indian Penal Code was added. After investigation charge-sheet was submitted under section 302 and some other sections of the Indian Penal Code and section 27 of the Arms Act. After taking cognizance case was committed where the charges were explained to the accused persons when they pleaded innocence then trial proceeded.

The defence of the appellants was of total denial of the time and place of occurrence as given by the informant. Appellant Ramashray Ram took plea of alibi also but it was taken for the first time when his statement under section 313 of the Cr.P.C. was

recorded.

The prosecution has examined 8 witnesses to prove its case. They are PW 1 Hiralal Paswan, PW 2 Ajay Paswan, PW 3 Chathu Paswan, PW 4 the informant Ram Dhyan Paswan, PW 5 I. O. Bacha Singh, PW 6 Sushil Kumar Tripathi, PW 7 Dr. C. B. Tripathi and PW 8 Bijay Kant Tiwary who is a formal witness who proved the fard beyan and formal FIR (Ext. 6 & 7 respectively).

Death of injured Ram Dahin Paswan is not in dispute. The death has been proved by PW 7 who has conducted the post mortem of Ram Dahin Paswan at 5 P.M. on 16.7.1998 at Varanasi. The cause of death was the ante mortem injury which was gun shot wound of entrance- 3/4 C.M. in diameter circular over front of left side abdomen 3 C.M. from midline and 3 C.M. below umbilicus with margin inverted and contused. The missile has passed through abdominal wall perforating small intestine at multiple places. The death is not under challenge and it is also not under challenge that the death was on account of ante mortem firearm injury.

The informant PW 4 has deposed that on the date of occurrence in the evening he and his brother were returning to their home for having their meal. When they reached in front of the house of Lalmuni Ram then they met with his nephew Devidayal who told that Ramashray, Lalmuni etc. were harvesting Behaya plants from the land of the Bihar Government. That land was filled up by the prosecution party, so they were aggrieved. The matter was taken up. Then it was decided that it would be sorted out in the

evening. In the meanwhile Lalmuni, Bighu having lathi, Nusah having garansa, Ramashray, Bhola and Indra having guns and Sipahi came from various directions and they encircled the prosecution party. Ramashray fired causing injury on the abdomen of the informant's brother Ram Dahin Paswan who fell down and when the informant tried to save himself then Lalmuni gave a lathi blow on his head. Nusah used his Garansa but it missed the target. There was profuse bleeding. On the shout of the informant PW 1, Hiralal Paswan, PW 2 Ajay Kumar, PW 3 Chhatu Paswan, the informant's mother Anurajiya and Phulbasiya assembled and the mother Anurajiya was assaulted by Sipahi with lathi. All the injured were brought for treatment to Nokha hospital. On account of the assault the informant's brother remained unconscious and so he did not make his fard beyan. The fard beyan was recorded by the police which led to registration of a formal FIR. The fard beyan was having signature of informant (Ext-1). The informant has described that after occurrence his seriously injured brother was taken to Sasaram hospital and thereafter to BHU for advance treatment but before proper treatment could be made available he died on the next day. The informant had gone to Varanasi. The post mortem was conducted. About other witnesses present at the time of occurrence namely Phulwasia it was stated that her being of advanced age between 82-90 years she was not in a position to come and depose. It was also stated that mentally she is not sane.

The informant was cross-examined and he described the

manner of assault. The informant has not stated about the plot or khata number of the land which was the bone of contention but has supported consistently about the assault. His evidence is consistent. Although he has been cross-examined in detail but prosecution has not been able to get any vital contradiction in his evidence. His cross examination has led to nothing.

PW 1 has supported the version of the informant. He has been examined as an eye-witness to the occurrence. He has stated that at the time of occurrence he was in his house near the place of occurrence. He has supported the charge that mother of Ram Dhyani namely, Anurajiya Devi, aunt Phulwasia Devi and Bhanu Ram were also assaulted and the occurrence was seen by others also. In the cross-examination of this witness the defence has also tried to suggest that he is an interested witness because the deceased was his uncle in village relationship. The defence has suggested that he had come to the place of occurrence after the occurrence so he is not the eye witness and he is giving incorrect evidence. The entire cross examination of the PW 1 is in line with examination-in-chief in which he has described the manner of occurrence and from the evidence it appears that the prosecution has been able to prove beyond all reasonable doubts that he was present at the time of occurrence and the alleged assault, therefore, evidence of PW 1 remained intact.

PW 2 was sitting at Darwaja at the time of occurrence which was situated near the place of occurrence. He saw Ram

Dahin and Ram Dhyani coming and as soon as they arrived near the house of Lalmuni Ram, all the accused persons came from different directions variously armed and assaulted. He has described the weapons and mode of assault made on the injured and deceased. He has also been cross-examined in detail. The defence has tried to give suggestion that he is not the eye-witness to the occurrence but he consistently stated that there was assault by the appellants on the date, time and at the place of occurrence.

PW 3 has been brought as eye witness to the occurrence and he has stated that how the occurrence started, continued and terminated. He has described the manner of occurrence and he has remained firm so far as his testimony is concerned.

PW 5 was the second investigating officer of the case who has taken over the charge of investigation from the first I. O. Ramchandra Yadav because he was transferred elsewhere. After taking over the charge of the case he visited the place of occurrence on 26.8.1988 and examined the informant. He has described the place of occurrence which was a public lane running from east to west which was having ten feet width and it was situated in Harijan Toli which was in the south of the village Sisirit.

House of Lalmuni Ram was situated in the south of the lane and it was facing north. House of Bighu Ram was adjacent to the house of Lalmuni Ram. House of Sadhu Paswan and Bahulal Paswan were also there. PW 5 has taken statements of other witnesses also. He has stated that Dr. Arun Kumar Upadhyay of Sadar Hospital has

recorded dying declaration of injured Ram Dahin Paswan at 8.00 P.M. on 14.7.1988 in Sadar Hospital at Sasaram which was proved by PW 5 (Ext-2). He has described the manner of recording the dying declaration and has stated that the doctor has taken the L.T.I. of Ram Dahin who died in Varanasi. He was transferred so he handed over the charge on 5.10.1988 to S. I. Later on charge-sheet was submitted. This witness got information regarding death when he went to the office. The defence has tried to suggest that there was no dying declaration and the same was a fabricated document.

Informant PW 4 has stated about the assault which had taken place in front of the house of Lalmuni Ram. PW 5 has thus established the existence of place of occurrence because other witnesses namely, the informant and others have also stated the same fact and there is no contradictions at all in the evidences of any witness with regard to manner of assault.

The contention of the defence is that first and third investigating officers were not examined which has caused grave prejudice to the defence because the defence has not been able to take out the contradictions of the evidences of PWs 1, 2 and 3 who have been allegedly examined as eye witness but in fact they were not the eye witness.

It appears from the record that the court has taken all steps to procure the attendance of the investigating officers but when they did not appear then the court had no option but to rely

upon the evidences which have come in course of the evidence which were led by the prosecution. The doctor of BHU was already examined. He has proved the death.

Vital lacuna in the prosecution case remained due to non-proving of the dying declaration which was recorded by the doctor of Sasaram. It was formally proved. There was no report that doctor A. K. Upadhyay was not available and as to how he could not be examined. This fact was considered prominently by the Presiding Officer, the Additional Sessions Judge, and non-examination of the person who has recorded the dying declaration has definitely gone in favour of the defence to the extent that the recorder of the statement was not examined. There are consistent evidences that on the date and time of occurrence the appellants formed an unlawful assembly from which fatal shot was given by Ramashray Ram and others have also caused injuries and so they are also held guilty. I find no infirmity with the findings of the trial court so far as the charges are concerned.

It has been submitted by the counsel for the appellants that Ramashray has remained in custody for more than five years and others have also remained in custody for considerably longer time during the trial and after their conviction. The appellants are not the hardened criminal and no previous convictions were proved against them. So lenient view is required to be taken by granting minor punishment.

This prayer has been opposed by the counsel for the

informant who has submitted that it was a gross case of high handedness.

The instant case is of the year 1988 and since then 21 years have passed. There is no adverse report regarding the conduct of the either of the appellants and all the appellants were of the advanced age because age of Lalmuni Ram was 45 years, Bigu Ram was 45 years, Bhola Ram was 32 years, Ramashray Ram was 27 years, Sipahi Ram was 40 years of age and Indra Ram was aged 35 years all in the year 1993. So it has been submitted that all of them have become of advanced age and they have been sufficiently been punished.

I have considered the submissions with regard to quantum of sentence. The appellant who has been convicted for ten years has remained in custody for five years. Similarly other appellants have also remained in custody for different periods for many months in course of trial. So I am in agreement with the submission of the learned counsel for the appellants that in the interest of justice the sentences are required to be modified. It is accordingly modified that the period undergone by the appellants shall be deemed to be sufficient for the ends of justice. With the aforesaid modification in sentence these appeals are dismissed.

(Shyam Kishore Sharma, J.)

**Patna High Court,
Dated 27th July, 2009
N.A.F.R./avin**